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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 299

THOMAS M. KAVANAGH and
EUGENE F. BLACK,
Appellants,
v.
SANFORD A. BROWN, Treasurer of Michigan, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

THOMAS M. KAVANAGH,
The Capitol,
Lansing, Michigan;
EUGENE R. BLACK,
County-City Building,
Port Huron, Michigan,
(members of the bar of the
Supreme Court, appearing
in their own behalf).

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

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INTRODUCTION

This is a direct appeal by Thomas M. Kavanagh and Eugene F. Black, plaintiffs below, from a judgment (styled "Order and Decree") of the United States District Court for the Eastern District of Michigan, Southern Division. By such judgment temporary and permanent injunctive relief, sought by the named plaintiffs from past—and

presently continuing—acts of the defendant fiscal officers of Michigan, committed by such officers under color of correlative and allegedly unconstitutional statutory provisions of Michigan,[1] was denied on the merits by a duly convened District Court of three judges. This jurisdictional statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is not as yet officially reported. It is attached to this jurisdictional statement as appendix A, *infra*, at pages 23-34.

The judgment of the District Court is dated July 11, 1962 and was entered July 11, 1962. It is attached hereto as appendix B, *infra*, at pages 35-37.

JURISDICTION

This suit was brought under sections 1331 (62 Stat. 930) and 2281 (62 Stat. 968) of Title 28, United States Code, to enjoin the operation and enforcement of the presently quoted statutes of Michigan on assigned ground that same deny to plaintiff-appellants equal protection in violation of the equality clause of the Fourteenth Amendment.

The final judgment (styled "Order and Decree") below, by which plaintiff-appellants' complaint was dismissed on the merits and with prejudice, was dated and entered July 11, 1962.

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[1] Upon authority of American Federation of Labor v. Watson, 327 US 582 and Lathrop v. Donohue, 367 US 820, this statement will refer to the questioned parts of Michigans Constitution and legislative enactments as "statutes" or "statutory provisions".

Appellants' notice of appeal was filed July 25 with the clerk of the District Court below. The statutory provision conferring jurisdiction of the Supreme Court to hear and determine this appeal is 28 USC, §1253 (62 Stat. 926).

With respect to the jurisdiction plaintiff-appellants counted below and count here upon the rule, announced first in *Osborn v. Bank of United States*, 9 Wheat (US) 738, that the courts of the United States will restrain a State officer from executing a State statute when to execute that statute would violate rights of the complainant assured to him by the Federal Constitution and would work irreparable damage to such complainant. To distinguish the line of cases relied upon by then Michigan Attorney General Adams,[2] plaintiff-appellants relied below and rely here upon the test which appears by footnote in *Georgia R. etc. Co. v. Redwine*, 342 US 299, 304, that is, "Appellant in this case merely seeks the cessation of appellee's allegedly unconstitutional conduct and does not request affirmative action by the State." In the *Redwine Case* the Court ruled (p. 304):

> "This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State. These decisions were reexamined and reaffirmed in *Ex Parte Young*, 209 US 123, 52 L ed 714, 28 S Ct 441, 13 LRA NS 932, 14 Ann Cas 764 (1908), and have been consistently followed to the present day."

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[2] See opinion of Mr. Justice Frankfurter, in Larson v. Domestic and Foreign Corp., 337 US 682, 729-732, for alignment of cases holding for and against the jurisdiction in suits brought against State officers. The heading reads:

> "Cases since Osborn v. Bank of United States, 9 Wheat (US) 738, concerning suits against governmental agents in which defense of sovereign immunity was raised."

Appellants have not and do not ask that the Federal judiciary order that affirmative action be taken by Michigan or her fiscal officers. They have not sought and do not seek to have the Federal judiciary fix the *amount* of the equal salaries members of the Michigan Supreme Court should receive. They sought and seek an injunction, nevessarily prospective in its operation and effect, by which the defendant State officers are enjoined from paying unequal salaries to members of such Court. Thereby appellants hope to obtain, in addition to affirmative answers for questions 1 and 3 as set forth in their notice of appeal, a determination by this Court that the concluding sentence of section 3 of article 16 of the Michigan Constitution, *in its application to the members of the Michigan Supreme Court as a class,* invidiously discriminates against such class in favor of circuit judges of the State, as a class. Emphasis in such regard will be made of the three word exemption, favoring circuit judges, which appears in such concluding sentence. *The like of it cannot be found in the Constitution of any other State* (Hawaii and Alaska, not examined, possibly excepted).

Appellants respectfully offer this concluding word concerning the jurisdiction: If as contended by them and upheld below the instant complaint conferred jurisdiction on the three-judge court to hear and determine the merits of the presented constitutional questions, then this Court on direct appeal from such court has "jurisdiction over *all* claims raised against the statute [statutes]." It was so held in *Florida Lime & Avocado Growers v. Jacobsen,* 362 US 73, 80, 81.

THE STATUTES INVOLVED

Two complementing statutes of Michigan are involved. They are:

A. The concluding sentence of §3 of Article 16 of the Michigan Constitution of 1908, reading:

> "Salaries of public officers, *except circuit judges*, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

B. The second section of Michigan Public Act No. 163, of 1960 (official section 601.1). The complete act, exclusive of title reads:

> "601.6 *Supreme court justices; salary* [M.S.A. 27.26].
>
> "Sec. 6. Each justice of the supreme court shall receive an annual salary of $25,500.00, payable out of the moneys appropriated by the legislature.
>
> "*Same; present justices.*
>
> "Section 2. Justices of the supreme court in office on the effective date of this amendatory act shall not receive any increase in annual salary until the expiration of their respective terms of office.
>
> "Approved May 24, 1960" (effective August 17, 1960).

It is necessary to advise at this juncture that *the quoted statute* (§601.6) of 1960 *was repealed* by the legislature of Michigan *during the legislative session of 1961*. See

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[3] The circuit judges of Michigan, 81 in all, are judges of Michigan trial courts of original jurisdiction. All appeals from such courts are taken directly to the Supreme Court of Michigan. The latter is the constitutional superintendent of such trial courts; also of all other Michigan courts (Mich. Const., article 7, §4). There is no intermediate appellate court.

Michigan Public Act No. 236, of 1961, p. 688, expressly repealing sections 600.1 through 681.13, including §601.6 above. The repeal does not, however, go into effect until January 1, 1963 (p. 691, same book of 1961 public acts). Such repealed section (§601.6) is superseded effective January 1, 1963, by §208 of the same act of 1961, No. 236 (p. 419 same book of 1961 public acts).

The superseding section will eliminate *that part of said act 163 (§2) which plaintiffs criticize as unconstitutional.* From and after January 1, 1963 the statutory replacement will stand effective as follows (Mich P.A. 1961, §208, p. 419 same book of 1961 public acts):

> "600.208 *Same; salary, expenses* [M.S.A. 27A. 208].
>
> "Sec. 208 (1) Each supreme court justice shall receive an annual salary of $25,500.00, payable out of the moenys appropriated by the legislature.
>
> (2) The justices shall not receive any allowance for traveling expenses between their residences and the seat of government.
>
> (3) The justices who attend judicial meetings called by the court administrator shall be reimbursed from the state treasury, upon the warrant of the state treasurer, for their actual and necessary expenses."

QUESTIONS PRESENTED

1. Do the Michigan statutes brought to question by plaintiff-appellants' complaint, consisting of the concluding sentence of article 16, section 3, of the Constitution of Michigan and correlative section 2 of Act No. 163 of the Michigan Public Acts of 1960, in their application to plain-

tiff-appellants as two of the eight equally sworn and equally working members of the Supreme Court of Michigan, invidiously discriminate against plaintiff-appellants in violation of the equality clause of the Fourteenth Amendment?

2. Do the same statutes, providing as they do exemption of all circuit judges of Michigan from the prohibition against salary increases said section 3 (of article 16) decrees, invidiously discriminate against unequally treated members of the Supreme Court of Michigan, plaintiff-appellants included, in violation of the equality clause of the Fourteenth Amendment?

3. Do the same statutes, considering the length of the elective terms of all members of the Supreme Court of Michigan compared with the shorter elective terms of all other judicial officers of Michigan, invidiously discriminate against all members of the Supreme Court of Michigan, plaintiff-appellants included, in violation of the equality clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Plaintiff-appellants, applying to the District Court for injunctive relief under §2281, Title 28, United States Code (62 Stat. 968), alleged that the operation and enforcement of the quoted statutes of Michigan deny to them the equal protection of the laws in violation of the equality clause of the Fourteenth Amendment. The defendant officers, appearing by former Michigan Attorney General (now Michigan Supreme Court Justice) Adams, moved to dismiss on jurisdictional grounds and, with respect to the merits, denied that the inequality charged by plaintiffs was or had become actionably invidious.

The motion to dismiss, and the merits of the case, were duly submitted to a court of three judges composed of the Honorable John D. Martin, United States Circuit Judge for the Sixth Circuit, the Honorable Thomas P. Thornton and the Honorable Fred W. Kaess, United States District Judges for the Eastern District of Michigan, on September 25, 1961. The issues were taken under advisement with allotted time for submission of briefs, all of which were duly furnished.

Judge Martin having become ill, and still another *pendente* change of the personnel of the Michigan Supreme Court having taken place,[4] plaintiff-appellants applied March 22, 1962 for a temporary restraining order to prevent irreparable damage. The application having been

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[4] The first change of personnel, occurring since commencement of this action, was the resignation October 10, 1961 of former Justice Talbot Smith to accept appointment to the United States District Court bench (Eastern District of Michigan); the annual salary at such post being $22,500. Had Justice Smith remained a member of the Michigan Court he would, under the ruling below, have been compelled to toil with his higher paid ($7,000 per year more) Brothers at the same bench and doing the same exact work, until December 31, 1965.

Present Justice Otis M. Smith was appointed (October 10, 1961) to fill the vacancy occasioned by Justice Talbot Smith's resignation.

The second change occurred December 31, 1961 when former Justice George Edwards resigned to become Police Commissioner of Detroit. Had Justice Edwards remained a member of the Court he would, under the ruling below, have been compelled to toil similarly with his higher paid Brothers, at the same bench and doing the same exact work, until December 31, 1967.

Present Justice Paul L. Adams was thereupon appointed to fill the vacancy occasioned by Justice Edwards' resignation.

Each newly appointed Justice, unlike his predecessor and on account of operation of the assailed statutes, commenced receiving and now receives an annual salary at the higher rate, $25,500. Ironically, former Attorney General Adams, defender of this case both as to jurisdiction and merit, has so far succeeded in preventing plaintiffs from receiving salaries at the higher rate; he meanwhile having moved up to the Court (January 1, 1962) to receive, as he now receives, a salary at the higher rate.

made under §2284, Title 28, United States Code, as amended June 11, 1960 (74 Stat. 201), and the three-judge Court having been satisfied, unavoidable delay considered, that the plaintiffs "may be unable to have redress under statutes of the State of Michigan for moneys denied them," a temporary order was issued (March 23, 1962) restraining the defendant State officers "from paying and continuing to pay unequal salaries to respective members of the Michigan Supreme Court." By such order all members of the Court were paid coequally (at the rate of $25,500 per annum) between such last given date and the date of dissolution of the temporary order (June 28, 1962). Since June 28, 1962 plaintiff-appellants, along with Chief Justice Carr, have been paid at the reduced rate of $18,500 per annum, the remaining five members of the Court meanwhile having been paid at the higher rate of $25,500 per annum. This situation will continue indefinitely, unless arrested by injunction or further resignations from the Court.

The temporary order of March 23, 1962 was issued by Judge Thornton "with the concurrence of Judges Martin and Kaess." Shortly thereafter (April 2) the tragic death of Judge Martin occurred. April 24 the Honorable Lester L. Cecil, Judge of the Court of Appeals of the Sixth Circuit, was designated to take Judge Martin's place as a member of the constituted Court. May 8 the parties stipulated that the reconstituted Court might proceed to determine all pending issues on the record and briefs as made and submitted. June 18 the Court filed its opinion, upholding the jurisdiction and holding further, on the merits, that the statutes assailed by plaintiff-appellants do not deny to them the equal protection of the laws. As previously noted the final judgment of the Court thereupon entered (July 11, 1962).

Plaintiff-appellants are Associate Justices of the Supreme Court of Michigan. Plaintiff Black, *not* appointed to the Court, was elected to the Court at the regular biennial spring election held in April of 1955, for the regular eight year term commencing January 1, 1956 and ending December 31, 1963. Plaintiff Kavanagh, *not* appointed to the Court, was elected to the Court at the regular biennial spring election held in April of 1957, for the regular eight year term commencing January 1, 1958 and ending December 31, 1965. All other present members of the Court were appointed thereto originally, save only as to Associate Justice Kelly. He, then Governor of Michigan, appointed present Justices Carr and Dethmers to the Court (Carr 1945 and Dethmers 1946) and later, at the spring election of 1953, was himself elected to the Court for the regular eight year term commencing January 1, 1954 and ending December 31, 1961. He, with his running mate on both occasions (Justice Dethmers), was reelected at the biennial spring election held in April of 1961 for the regular eight year term commencing January 1, 1962 and ending December 31, 1969.

The Constitution of Michigan (article 7, §2) provides that the highest court of the State, designated the Supreme Court, "shall consist of one chief justice and associate justices, to be chosen by the electors of the State at the regular biennial spring elections"; that "not more than two justices shall go out of office at the same time," and that the length of the staggered terms of the members of the court "shall be prescribed by law." (It will appear at once that Michigan's legislature may change, upward or downward at will, the numerical membership of the court; also that the legislature may, at similar will, shorten or lengthen the elective terms of members of the Court.)

Since 1963 the total membership of the Court has been, and is now, eight in number (CL Michigan 1948, §601.1). For reasons concealed in the depths of Michigan politics the constitutional Chief Justice has never been "chosen by the electors of the state." Instead, since 1963 and prior to 1955, "The powers and duties appertaining to the office of chief justice of the supreme court" (not the office itself we respectfully note) were made to "devolve," by an annual system of rotation effected by statute, upon the two members of the court whose terms were due next to expire (CL 1948, §601.5). Thus the two incumbent justices due next to meet the people, for reelection to the Court "at the regular biennial spring elections," have enjoyed—one after the other—the public designation of "Chief Justice" during the year preceding and during the year of such biennial spring election. This system of designating the "Chief Justice" continued until 1954. In that year Public Act No. 142 was enacted by the legislature of Michigan. Such act of 1954 pertinently provides (CLS 1956, §601.5):

> "The powers and duties appertaining to the office of chief justice of the supreme court on and after January 1, 1956, and prior thereto in case any vacancy occurs in the office of chief justice of the supreme court, shall at all times devolve upon and be exercised by a chief justice chosen by the justices of the supreme court from their own number, and any chief justice so selected shall serve until the expiration of the term for which he has been elected as a justice of the supreme court."

By the Act of 1954 the powers and duties of the chief justice of the Michigan Supreme Court were made to "devolve" upon Associate Justice John R. Dethmers. The devolution was effected by majority vote of the then constituted Court (adopted and made effective January 6,

1956). Since that date, and until April 3, 1962, such devolution continued in effect. On the last mentioned date such powers and duties were made to "devolve" upon Associate Justice Carr. Justice Carr is now the official devolutionee of such powers and duties. As in the case of Justice Dethmers, he is recognized and designated as "Chief Justice." He, by the resolution of April 3 above, will remain such devolutionee until his elective term ends December 31, 1963. He cannot be a candidate for re-election to the Court on account of an age limit fixed by section 17 of article 7 of the Michigan Constitution. He accordingly will retire at the end of 1963.

In 1939, effective January 1, 1940, the Constitution of Michigan was amended to provide what is popularly known as a "non-partisan judiciary."[9] All judges of the courts of record of the State, including members of the Supreme Court, are thereby elected at regular term intervals, at non-partisan elections, by means of separate ballots containing no partisan designation. However, as to the Supreme Court only, the method of nomination for such non-partisan office was left to legislation, that is, such nominations were left to "be made as now or hereafter provided by law." The result has been that all nominations of candidates for the office of Michigan Supreme Court Justice have, since 1939 as before, been made at partisan conventions. This brings us to the present and immediately past political composition of the Court.

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[9] The amendment of 1939 includes a built-in and provenly effective guarantee of election and re-election of an incumbent judicial officer, once he has attained the bench by appointment of the Governor or election thereto. The guarantee reads (Mich. Const., article 7, §23):

> "There shall be printed upon the ballot under the name of each incumbent judicial officer, who is a candidate for nomination or election to the same office, the designation of that office".

The instant complaint, not traversed in such regard by the defendant-appellees, shows that Justices Carr, Dethmers and Kelly are elected members of the Court by Republican nomination; that Justices Black, Kavanagh and Souris are elected members of the Court by Democratic nomination, and that Justices Otis M. Smith and Adams are (at present) members of the Court by gubernatorial appointment only. The last two are slated to be candidates for Democratic nomination and term election at the general election to be held November 6, 1962.

Five members of the Court, so composed, are by virtue of the first section of the quoted act of 1960 receiving an annual salary of $25,500; whereas the remaining 3 members, Justices Carr, Black and Kavanagh, are receiving and will continue to receive, failing presently sought injunctive relief, an annual salary of but $18,500. The situation came about this way.

In 1952, shortly before Republican Justice John R. Dethmers was due to run for his first regular 8 year term, and shortly before former Republican Governor Kelly was due to become his running mate as a candidate for like term membership at the same election (biennial spring election of 1953), the legislature enacted a statute prospectively elevating the annual salaries of to be elected or appointed members of the Court to $18,500. The statute:

> "60l.6 *Supreme court justices; salary* [M.S.A. 27.26].
>
> "Sec. 6. Each justice of the supreme court shall receive an annual salary of $18,500.00, payable out of the moneys in the state treasury belonging to the general fund not otherwise appropriated.

Same; present judges:

"Section 2. Justices of the supreme court in office on the effective date of this amendatory act shall not receive any increase in annual salary until the expiration of their respective terms of office."

Exactly 8 years later, and similarly during the year preceding their candidacy for their next 8 year coterminous terms, the legislature again elevated—prospectively—the salaries of the same two members of the Court. (See quotation of the act of 1960, *ante* p 6). During the past 13 years no other legislation, designed to increase or decrease the salaries of Michigan Supreme Court Justices, has been enacted.

Justices Dethmers and Kelly, having been elected in 1961 for such coterminous eight year terms (Jan. 1, 1962 through December 31, 1969) commenced receiving the 1960-fixed higher salary on January 1, 1962 and continue now to receive same. In the meantime, former Justice Voelker having resigned from the Court and having been replaced by appointed and later elected Justice Souris, the latter commenced receiving (in November of 1960), and now receives, his salary at the higher rate. Subsequently, Justices Talbot Smith and George Edwards having resigned and having been replaced by (appointed) present Justices Otis M. Smith and Paul L. Adams, the latter two members of the Court immediately commenced receiving, and do now receive, salaries at the higher rate.

This leaves three members presently receiving an annual salary of $18,500 and the remaining five members receiving an annual salary of $25,500. Such inequity, among the equally sworn-to-the-same-work members of the Court, will unless arrested by injunction (or in event of new and more punitive legislation in Michigan) continue as follows:

As to Justices Black and Carr (the latter being the veteran and most experienced member of the Court), such

members will continue until December 31, 1963 to receive an annual salary of $18,500, as five other Justices receive an annual salary of $25,500 per year.

As to Justice Kavanagh, he will continue to receive the lower salary two years longer. During that biennial (1964-1965), Justice Kavanagh, if he remains a Justice, *will be the only member of the Court not paid at the higher rate.*

THE QUESTIONS ARE SUBSTANTIAL

There is no other forum to which these plaintiffs may repair. All members of the Michigan Supreme Court are disqualified absolutely on account of personal interest (*Peninsular R. Co. v. Howard*, 20 Mich 18; *Stockwell v. Township Board*, 22 Mich 341; *Tumey v. Ohio*, 273 US 510, 522, citing the *Peninsular* and *Stockwell Cases*). And even if appellants could, despite such rule of disqualification, seek relief in the Supreme Court of Michigan, they would not do so for reasons of evident embarrassment—both ways. Finally, Michigan does not provide (as some States do) for calling up of inferior court judges for high court duty.

The decision below is an unrestricted license—issued to Michigan's legislature—authorizing acts of favoritism and punishment, for and against selected members of the higest Court of one of our great industrial States. There is nothing now to prevent legislative action reducing to, say, $10,000. per annum, the salaries of the two Michigan Supreme Court Justices who are due for eight year election (1964 through 1971) less than 10 months hence; with six other Brothers each receiving as that eight year period proceeds an annual salary of $25,500 (or more if and when legislative favorites come up for election during the period

1964-1971). Now all the legislature need do is *decrease* the salary by act made effective prior to election day (April 1, 1963); just as it *increased* the salary for two favorites on two occasions, as we have shown.

There is nothing, actually, to prevent legislative manipulation of salaries among the members of the Court in such way as to drive therefrom all but those who care not to offend legislators by decisions which, on occasion, must be onerous and unpalatable in legislative halls. The recent decision of the Michigan Supreme Court in *Scholle v. Secretary of State* (July 18, 1962), is a fair example of such onerous decision as was *Lockwood v. Com'r. of Revenue*, 357 Mich 517 (1959). The former was preceded, as one of the opinions (not yet reported) fully discloses, by an open legislative threat to impeach any Michigan Justice who voted to hold that the Michigan Senate was invalidly constituted.

It will not do to say that the jurisprudence of Michigan has nothing to fear in such regard. The remark is unprovable either way and, whether it be true or not, the fact of possibility remains. That is enough. As said in the like case of *Bailey v. Waters*, 308 PA 309, 162 A 819, 822:

> "It may be argued that the judiciary has nothing to fear from any attempted legislative control by a reduction of salaries. The question is not one of probability. It is one of possibility. It is not a question of fear, but one of power with which we are confronted."

The Court is respectfully referred to the following representative State cases. In each the court was called upon to consider—and avoid if possible—the untoward result of that which the District Court below has licensed: *Mc-*

Govern v. Mitchell, 78 Conn 536, 63 A 433, 437; *Commonwealth v. Mann*, 5 Watts & S. 403; *Commonwealth v. Mathues*, 210 Pa 372, 59 A 961, 973, and *Higer v. Hansen*, 67 Idaho 45; 170 P2d 411.

We hasten to add that each of these cases portrays the dilemma of a court which, faced with the impossible alternative the District Court has approved, proceeded to construe with forcefully stated reasons typical no-increase no-decrease provisions as *not* applying to judges who as a class are sworn to equal toil upon the same judicial product.

Probably the foremost of these cases is *Commonwealth v. Mathues*, the opinion of which was written by Judge (later Chief Justice) Von Moschzisker. He wrote, for the court (p 977, NR citation):

> "New and inexperienced judges would draw salaries considerably larger than old and experienced members of the judiciary. We would practically be face to face with a declaration by the Legislature, as shown by the act of 1903, that the salaries paid to the old judges are inadequate and not up to the adequate standard required by the constitutional mandate; and this condition would be impossible of remedy, or, at least, it could not fade out, until all of the present members of the Supreme Court, with their long terms of service yet to come, had passed from the scene, by which time we can fairly believe, according to the well-known fluctuations of the value of money, salaries would again have to be readjusted with the like condition of inequality repeated and covering another long period of years."

Mr. Justice Bell, unreservedly concurring, added this (p 979, NR citation):

> "But if we adopt the contention urged on behalf of the State Treasurer, we are driven to a condition, not of uniformity, but of inequality, and that of the most unreasonable and absurd character. What would be thought of a railroad which paid its youngest engineer, recently promoted from a fireman, and intrusted only with the handling of a shifting engine, a greater salary than that paid the veteran train runner, intrusted with the lives of hundreds of passengers, and guiding the swiftly moving express train with a skill gained by years of experience? But we are forced to such an unreasonable and absurd condition of affairs if we adopt the construction contended for by the respondent."

In the case cited below the court put our contention tersely in one sentence.

> "Certainly it is repugnant to sound principles of judicial administration to have justices performing the same functions and carrying the same responsibilities receiving different compensation." (*Ben-Venga v. LaGuardia*, 48 NYS 2d 117, 121; appeal transferred to Third Division by First Division, 50 NYS 2d 772; affirmed on other ground by Third Division 52 NYS 2d 767; affirmed on other ground by Court of Appeals 63 NE2d 88).

If it is so repugnant, and if appellants have proved the stated premise—as we submit stands established by the pleadings—, then it must be right to say that the presumption which ordinarily burdens those who assert a denial of equal protection has been in this case—completely destroyed.

In reality, what is involved here is the open prospect of undue influence over the judicial department of a State by the legislative branch thereof. *Commonwealth v. Mann*,

cited above and quoted in *Commonwealth v. Mathues* (p 973 NR citation) conveys the thought:

> "If it be correct that the power over a man's subsistence amounts to a power over his will, what instrument better calculated to give the Legislature an undue and improper influence over the judicial department of the government than by an address in the manner proposed to their hopes as well as their fears. As, for example, take the case in hand. Here the Legislature have assumed the control of the relator so far as he could be *influenced by the possession* or loss of $400 a year. Cases may occur when, with the aid of the additional salary, it may be merely a decent support of himself and family. A power, therefore, to reduce it may, it is obvious, be equivalent to a power to deprive him of office altogether."

Turning finally to presented Question 2:

Less dramatic than the discrimination these statutes attempt among and between the eight members of Michigan's Supreme Court, and yet even more lastingly vicious from a constitutional standpoint, is the discrimination by which the concluding sentence of said section 3 *favors* circuit judges, *as a class*, and *disfavors* Supreme Court Justices, *as a class*. On what ground of non-fanciful reason may it be said that trial court judges of a State[6] (elected for six year terms) may at legislative as well as local will receive during-term salary increases, but Supreme Court Justices of the State (elected for longer terms) may not?

---

[6] The Board of Supervisors of a county may, at any time, contribute additional salary to the circuit judge or judges of such county. Mich. Const. 1908, article 7, §12.

Here, then, is a separately forceful reason for holding that said section 3 invidiously discriminates against members of the Supreme Court of Michigan as a class. And we would point out that *the District Court, so far as its opinion discloses, failed to consider the discriminatory fact and result of those exempting words,* "except circuit judges."

CONCLUSION

The opinion below discloses no effort to conjure "any state of facts" which "reasonably may be conceived to justify" the discrimination appellants would rectify. We submit, respectfully, that no mortal can so conjure or conceive. By undenied allegation of fact it is shown that the operation of the statutes in question has produced these continuing and additional discriminatory results:

Thirty-five circuit judges of Michigan, all being judges of inferior courts and all being regularly elected for shorter terms than Michigan Supreme Court Justices, are actually receiving substantially higher judicial salaries than are being paid to three Supreme Court judges of the State, plaintiffs being two of the three. These higher circuit court salaries range from $20,000 per annum to $25,001 per annum.

All undisputed facts considered, appellants believe that the questions presented by this appeal are substantial in that their necessitous solution will conduce toward better administration of justice in one of the States, and certainly

to a less rapid turnover of the personnel of that State's highest court. It is therefore submitted that the case calls fairly for plenary consideration.

Respectfully submitted,

THOMAS M. KAVANAGH,
The Capitol,
Lansing, Michigan.

EUGENE F. BLACK,
County-City Building,
Port Huron, Michigan.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

THOMAS M. KAVANAGH and EUGENE F. BLACK, *Plaintiffs*, v. SANFORD A. BROWN, Treasurer of Michigan, OTIS M. SMITH, Auditor General of Michigan, and IRA POLLEY, Controller of the Michigan State Department of Administration, *Defendants.*	CIVIL ACTION No. 21517

OPINION

A statutory three-judge court was convened pursuant to 28 U.S.C.A. §2281. Jurisdiction is alleged to exist under 28 U.S.C.A. §1331(a).[1] Plaintiffs are two of the eight Supreme Court Justices of the State of Michigan. They assert rights which they claim are protected by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The three defendants are office holders (at the time of the commencement of this action) of the State of Michigan in the respective ca-

[1] The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

pacities set forth in the title of this action. They filed a motion to dismiss the action and also a motion to strike certain paragraphs of the complaint. This latter motion was heard by the Court and denied. Two weeks thereafter their motion to dismiss the action was heard simultaneously with the hearing on the merits. At said hearing plaintiffs moved to withdraw from their prayer for relief paragraphs 4 and 5, the gist of these being a request for a mandatory injunction ordering the defendant fiscal officers of Michigan to make salary payments according to certain set standards. The motion to withdraw paragraphs 4 and 5 was granted.

The motion to dismiss is based on an alleged lack of jurisdiction. In support of this, defendants set forth five grounds in their motion as follows:

> "1. The District Court of the United States for the Eastern District of Michigan has no jurisdiction, as the complaint does not set forth a cause of action arising under the Constitution, laws or treaties of the United States as is requisite to jurisdiction under United States Code, Title 28, section 1331.
>
> "2. The District Court of the United States for the Eastern District of Michigan has no jurisdiction or judicial power to entertain the action sought to be enforced by the complaint, because it is in essence a suit against the State of Michigan.
>
> "3. The District Court of the United States for the Eastern District of Michigan has no power to issue the coercive writs of mandamus or mandatory injunction sought by the complaint filed herein.
>
> "4. The District Court of the United States for the Eastern District of Michigan has no jurisdiction of the action sought to be enforced by the complaint, as the jurisdictional amount required under United

States Code, Title 28, section 1331, is obtained by aggregating two claims not subject to aggregation.

"5. The District Court for the United States for the Eastern District of Michigan has no jurisdiction of the action sought to be enforced by the complaint as amended, since the matter now in controversy does not equal or exceed the jurisdictional amount of $10,000.00 required under United States Code, Title 28, Section 1331."

As to the first ground, it is difficult to comprehend what defendants have in mind in view of the fact that the complaint is bottomed squarely on an alleged violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. As to the second ground, if it were sound, it would have the effect of rendering ineffective 28 U.S.C.A. §2281. That section provides for exactly such a procedure as we have here, under the same circumstances as are here present. The third ground is, we believe, moot because of plaintiffs' withdrawal of paragraphs 4 and 5 from their prayer for relief. The fourth and fifth grounds are obviously without merit, as the jurisdictional amount is clearly present as to each plaintiff. This is a matter of simple arithmetic. If there still be any doubt as to the jurisdiction of the Court to determine this case on the merits, such doubt must be completely resolved in favor of the existence of jurisdiction in the light of the opinion of the United States Supreme Court delivered March 26, 1962 in the case of *Baker v. Carr*. This Court has jurisdiction to determine the instant controversy.

The prayer for relief, as it remains after the withdrawal of paragraphs 4 and 5, reads as follows:

"Plaintiffs deem themselves entitled to adjudicatory process and relief as follows:

"1. To a permanent injunction restraining the operation and execution of said Act 163 save only on a basis of strict equality of payment of salary to each and all of the member justices of the Michigan Supreme Court.

"2. To a judicial determination that the quoted provision of Article 16 of the Constitution of Michigan, and quoted section 2 of said Act 163, offend plaintiffs' right to equal protection of the laws and that both, as applied to plaintiffs, are invalid.

"3. To a judicial determination that section 2 of said Act 163 is severable from the remainder of the act and, when so severed, that the remainder of the act is valid and fully effective as of its legal date (August 17, 1960).

"6. To a declaratory decree determining that the uniformly sworn status and the uniform duties of all members of the Michigan Supreme Court is such as to require equal compensation to each at all times.

"7. To convocation, pursuant to section 2284 of Title 28, United States Code, of a three judge court; such court to hear and determine the issues presented by this complaint.

"8. To such other and further relief as may be agreeable to equity and good conscience."

The provision of Article 16 of the Constitution of Michigan which plaintiffs claim to be violative of the Equal Protection Clause is Section 3, and reads as follows:

"Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract

entered into. Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

The legislature of the State of Michigan by Act No. 163 of the Michigan Public Acts of 1960 effected a salary increase for justices of the Michigan Supreme Court. The Act provides that "Each justice of the Supreme Court shall receive an annual salary of $25,500.00, payable out of the moneys appropriated by the legislature", and also includes a proviso consistent with the Article 16 provision of the State Constitution. This proviso reads as follows: "Justices of the Supreme Court in office on the effective date of this amendatory act shall not receive any increase in annual salary until the expiration of their respective terms of office." We view the proviso as neither adding to nor subtracting from the prohibition contained in Article 16. If Article 16, §3, is valid, then the proviso is valid; if not, the proviso falls. It has no independent status. The plaintiff justices are required to continue receiving their present salary of $18,500.00 for their respective terms of office. They will, however, be eligible to receive the higher salary of $25,500.00 upon the commencement of new terms of office. Justice Black's present term ends December 31, 1963, and that of Justice Kavanagh, December 31, 1965. It is the contention of plaintiff justices, that because certain members of the court entered the service of the Supreme Court subsequent to the effective date of Act No. 163 and as a result are receiving the increased salary, that the differential in salaries among the eight justices constitutes a discrimination which is repugnant to the Equal Protection Clause so as to render the offending Article 16, §3, of the Michigan Constitution invalid. We are requested to so declare.

Our approach to this problem need not be complex nor many-faceted. There are no disputed factual issues, and the factual picture is simple. There are eight justices serving on the Supreme Court of the State of Michigan. They do not all receive the same or equal compensation. They are all required to render the same or equal services. Some of those who have served longer than others receive less compensation. They are therefore receiving unequal treatment. This is the result of three factors—Article 16, §3, of the State Constitution, Act No. 163 of the Michigan Public Acts of 1960, and the commencement of new terms of office for certain justices subsequent to the effective date of Act No. 163. Plaintiffs have no quarrel with the second and third factors. Act No. 163 provides for an increase in salary. Plaintiffs do not object to this. The fact of the embarkation upon new terms of office for some of the justices is not objected to by plaintiffs. It is the first factor to which plaintiffs voice vigorous objection—Article 16, §3. This is the stumbling block to their getting the benefit of the salary increase during their existing terms of office. This provision they contend denies them the equal protection of the laws as it is guaranteed to them by the Fourteenth Amendment. This contention is not a novel one. Supreme Court of the United States has been called upon to determine, and has determined again and again, whether various types of state legislation[2] which work a discrimination are offensive to the constitutional safeguard. A recent such case is that of *McGowan v. Maryland*, 366 U.S. 420 (1961). The question there present concerned

[2] Constitutional provisions are embraced in the words "State statute" as used in §2281. American Federation of Labor v. Watson, 327 U.S. 582, 592-593 (1948); Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 343-344, footnote 3 (1951); Wilson v. Beebe, 99 F. Supp. 418, 421 (1951).

the validity of Maryland's Sunday Closing Laws. The language of the Supreme Court contained in Part I of its opinion is equally pertinent here, as is also that contained in several of the cases cited therein by the Court. We proceed here to set forth quotations from opinions of the United States Supreme Court which must be our touchstone for making the present determination:

McGowan v. Maryland, 366 U.S. 420, 425-426 (1961).

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify ..."

Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955):

> "Secondly, the District Court held that it violated the Equal Protection Clause of the Fourteenth Amendment to subject opticians to this regulatory system and to exempt, as §3 of the Act does, all sellers of ready-to-wear glasses. The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and

apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch."

Kotch v. Pilot Commissioners, 330 U.S. 552, 556 (1947):

"The constitutional command for a state to afford 'equal protection of the laws' set a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. * * * This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities."

Metropolitan Co. v. Brownell, 294 U.S. 580, 582-583 (1935):

"We may assume that the petitioner, by entering the State of Indiana and carrying on business there, is not barred from asserting that its legislation conflicts with the Federal Constitution, and we pass

directly to the single question presented, whether the prohibition applied here to a foreign casualty insurance company infringes the Fourteenth Amendment because it is not likewise applied to domestic companies. Petitioner does not assail the prohibition as not within the scope of the legislative power or as itself so arbitrary or unreasonable as to be a denial of due process. It is not argued, nor could it be on the record before us, that the restriction would be unconstitutional if applied equally to both classes of corporations. Discrimination alone is the target of the attack.

"The equal protection clause does not prohibit legislative classification and the imposition of statutory restraints on one class which are not imposed on another. But this Court has said that not every legislative discrimination between foreign and domestic corporations is permissible merely because th differ, and that with respect to some subjects of legislation the differences between them may afford no reasonable basis for the imposition of a statutory restriction upon foreign corporations, not applied to domestic corporations. The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the difference between them are pertinent to the subject with respect to which the classification is made. If those differences have any rational relationship to the legislative command, the discrimination is not forbidden."

It seems clear from the above that the alleged discrimination must be tested by its relationship to the achievement of the objectives of Article 16, §3, of the State Constitution. The Michigan Supreme Court has spoken clearly and unequivocally in the case of *Vigelius v. Houghton County Clerk*, 317 Mich. 138, decided in 1947. The following quotation from *Barrus v. Engel*, 186 Mich. 540, 544, 545, appears in *Vigelius* at pages 143-144, and we quote it as set forth there:

"'No direct authority upon the exact question presented here is to be found in our decisions. The wisdom of a provision prohibiting any change either by increase or reduction of a public officer's salary during his term has been universally recognized. Such provisions are common in constitutions and statutes of the various States, and the courts have been firm in restraining attempts to evade them. This Court has been in line with the general rule when deciding cases where phases of the question have arisen. *People, ex rel. Douvielle v. Manistee County Supervisors*, 40 Mich. 585; *Anderson v. Hill*, 54 Mich. 477; *Olds v. State Land Office Commissioner*, 134 Mich. 442; *Chase v. Hart*, 162 Mich. 74.

* * *

"'We find here not only the constitutional prohibition, but that in the amendment itself which created this office those empowered to determine the matter of compensation exercised that authority, and declared in express language that no salary or other compensation should attach to the office, and also that the "home-rule law" which authorized the amendment again declares that a city has no power to change the salary or emoluments of a public official after his appointment or election.

"'Restrictive provisions of this class are universally recognized as in the interest of good government and founded on sound reasons of public policy. They are adopted for the two-fold purpose of protecting the public by restraining those in office from taking advantage of their positions and official influence to unduly secure added compensation not contemplated and to which they were not entitled when they were selected for and accepted office, and also to secure each individual officer in enjoyment of the emoluments provided and rightfully to be expected when he accepted his office, by protecting him from any unfriendly power which might, for any reason, otherwise reduce or abolish them.'"

An expression from the highest court of a sister state to the same effect is to be found in the case of *The State, ex. rel., Mack, Judge v. Guckenberger*, Aud., 139 Ohio St. 273, 278 (1942) where the Court spoke as follows:

> "The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that it cannot be changed by the Legislature during the term; that the judge is precluded from using his personal influence or official action to have the Legislature increase his salary; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are fully and effectually preserved by the terms of the present statute, *albeit* the compensation of the judge is made variable, from and after the last federal census becoming effective during his term."

Need we expound further? Our view as to the wisdom of the provision is of no account. Our view as to its fairness as applied in the instant case is of no account. Our function is to apply the law as laid down by the United States Supreme Court. We are convinced that according to its precepts we may not here declare Article 16, §3, to be violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon

some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co. v. Brownell*, 294 U.S. 580, 584 (1935). We are not convinced that an apparently reasonable basis for the alleged discrimination does not exist, or that the statutory (constitutional) discrimination is invidious. We are unable to say that this provision does not provide equal protection of the laws.

An appropriate decree may be presented.

Lester L. Cecil,
United States Circuit Judge.

Thomas P. Thornton,
United States District Judge.

Fred W. Kaess,
United States District Judge.

Dated: June 18, 1962.

A true Copy:

John J. Ginther, Clerk,
By: Kathleen Farnsworth,
Deputy Clerk.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

THOMAS M. KAVANAGH and EUGENE F. BLACK, *Plaintiffs*, v. SANFORD A. BROWN, Treasurer of Michigan, OTIS M. SMITH, Auditor General of Michigan, and IRA POLLEY, Controller of the Michigan State Department of Administration, *Defendants*.	CIVIL ACTION No. 21517

ORDER AND DECREE

This cause having been duly and finally submitted to a court of three judges composed of the Honorable John D. Martin, United States Circuit Judge for the Sixth Circuit, the Honorable Thomas P. Thornton and the Honorable Fred W. Kaess, United States District Judges for the Eastern District of Michigan, and

Plaintiffs having thereafter, on March 22, 1962, filed their "Application for Interlocutory Injunction" restraining the defendant fiscal officers, until further order, from continuing to pay unequal salaries to members of the Supreme Court of Michigan, and

The Honorable Thomas P. Thornton, with the concurrence of Judges Martin and Kaess having issued a temporary restraining order dated March 23, 1962, which has heretofore been dissolved by separate order of June 28, 1962, and

The Honorable John D. Martin, United States Circuit Judge, having died April 2, 1962 prior to final determination of the issues, and the Honorable Lester L. Cecil, United States Circuit Judge for the Sixth Circuit, having been duly designated on April 23, 1962 to serve as the circuit judge on this three-judge court, and

The parties to this cause having stipulated that the issues presented be resubmitted without further argument or briefs to such newly composed court on the record and briefs existent on the date of such stipulation, and

Said newly composed three-judge court having filed its opinion on June 18, 1962 determining that this Court has jurisdiction to decide this case on the merits, and that therefore defendants' motion to dismiss should not be granted, and determining that the alleged statutory (constitutional) discrimination against plaintiffs does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States,

It is ordered and decreed:

That defendants' motion to dismiss be, and the same is hereby denied,

That Section 3 of Article 16 of the Constitution of the State of Michigan does not deny to plaintiffs the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

That plaintiffs are not entitled to any of the relief as prayed for in their Complaint.

/s/ Lester L. Cecil,
United States Circuit Judge.

/s/ Thomas P. Thorton,
United States District Judge.

/s/ Fred W. Kaess,
United States District Judge.

July 11, 1962.